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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT TACOMA

11 LESTER K. CORNETTE,

12 Plaintiff,

13 v.

14 JOHN E. POTTER, in his official capacity
15 as UNITED STATES POSTAL
16 SERVICE POSTMASTER GENERAL, et
17 al.,

18 Defendants.

CASE NO. C09-5373BHS

ORDER DENYING
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT,
GRANTING DEFENDANTS'
CROSS MOTION FOR
SUMMARY JUDGMENT,
AND DENYING PLAINTIFF'S
MOTION FOR
RECONSIDERATION

19 This matter comes before the Court on Plaintiff's motion for summary judgment
20 (Dkt. 13), Defendants' cross motion for summary judgment (Dkt. 34), and Plaintiff's
21 motion for reconsideration (Dkt. 47). The Court has considered the pleadings filed in
22 support of and in opposition to the motions and the remainder of the file and hereby
23 grants Defendants' motion and denies Plaintiff's motions for the reasons stated herein.

24 **I. PROCEDURAL HISTORY**

25 On June 23, 2009, Plaintiff Lester K. Cornette filed a pro se complaint against
26 Defendants John E. Potter, in his official capacity as United States Postal Service
27 Postmaster General; Eric Holder Jr., in his official capacity as United States Attorney
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1 General; Jeffery C. Sullivan, in his official capacity as United States District Attorney;
2 and Jay Bonner, Ronald Nilsby, Paula Louise Stafford, Bob Huffman, Katherine Nash,
3 Jon Patton, and Robert Montgomery in their official capacities with the United States
4 Postal Service. Dkt. 1 (“Complaint”) at 1-2. Plaintiff alleges that Defendants violated
5 Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 200e, et seq. (“Title
6 VII”); the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12203(a) (b); and the
7 Rehabilitation Act of 1973, 87 Stat. 357, as amended, 29 U.S.C. § 701, et seq.
8 (“Rehabilitation Act “). Complaint at 6-26.

9 On August 26, 2009, Plaintiff filed a motion to compel requesting that the Court
10 order Defendants to participate in the mandatory discovery conferences. Dkt. 10. On
11 September 4, 2009, Defendants responded. Dkt. 12. On September 9, 2009, Plaintiff
12 replied. Dkt. 16.

13 On September 2, 2009, Plaintiff filed a motion for summary judgment. Dkt. 13.

14 On September 8, 2009, Defendants answered the complaint (Dkt. 14) and filed a
15 motion to continue Plaintiff’s motion for summary judgment and to stay the parties’
16 obligations under the Court’s order that set the deadline for a discovery conference. Dkt.
17 15.

18 On September 10, 2009, Plaintiff filed a motion for default judgment. Dkt. 17. On
19 September 17, 2009, Defendants responded. Dkt. 19. On September 22, 2009, Plaintiff
20 replied. Dkt. 24.

21 On September 21, 2009, the Court granted Defendants’ motion to continue
22 Plaintiff’s motion for summary judgment and to stay the parties’ discovery obligations.
23 Dkt. 21.

24 On October 5, 2009, Defendants responded to Plaintiff’s motion for summary
25 judgment and filed a cross-motion for summary judgment. Dkt. 34. On October 8, 2009,
26 Plaintiff replied to Defendants’ response to his motion. Dkt. 41. On October 28, 2009,
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1 Defendants replied to their motion. Dkt. 43. On November 2, 2009, Plaintiff filed
2 another reply to Defendants' motion. Dkt. 44.

3 On November 20, 2009, the Court issued an order denying Plaintiff's motion to
4 compel, Plaintiff's motion for default, and Plaintiff's motion for default and default
5 judgment. Dkt. 45. On December 1, 2009, Plaintiff filed a motion for reconsideration of
6 that order. Dkt. 47.

7 **II. FACTUAL BACKGROUND**

8 In their answer, Defendants claim that:

9 plaintiff's complaint includes approximately forty pages of unnumbered
10 paragraphs with references to and purported descriptions of the contents of
11 attached exhibits and portions of the administrative record; purported
12 citations to and descriptions of various statutory authorities, as well as
13 judicial decisions; and plaintiff's various allegations and demands

14 Federal Defendants further admit that the plaintiff is an employee of
15 the U.S. Postal Service. During the relevant period the plaintiff was
16 employed by the Postal Service as a custodian at the Seattle Air Mail
17 Center. Federal Defendants admit that the plaintiff applied, but did not
18 qualify for, participation in the Postal Service's Associate Supervisor
19 Program. As a result of his failure to qualify, the plaintiff made a claim for
20 discrimination and retaliation. Federal Defendants admit that the course of
21 that claim's investigation and resolution is set forth in the administrative
22 record.

23 Dkt. 14 at 2-3.

24 Defendants claim that the supervisory track for Customer Service, Postal Service,
25 required successful completion of the Associate Supervisor Training Program ("ASP").
26 In early 2008, Plaintiff applied for admission to the ASP. *See*, Dkt. 35, Affidavit of Jay
27 Bonner ("Bonner Aff."), ¶ 2.

28 Postal employees interested in applying for the ASP were required to complete and
submit a PS Form 991 and a separate statement of qualification of knowledge, skill, or
ability ("KSA"). *See id.* ¶ 5. Those that sent in a completed PS Form 991 were then
scheduled for the Exam 600, which was a written exam completed on a scantron form and
graded by a computer. *Id.* It is undisputed that Plaintiff passed the Exam 600.

The next step in the ASP application process involved assessing the passing
applicant's Exam 600 result and his PS Form 991 to determine if the applicant would be

1 interviewed by the Review Committee. *Id.* It is undisputed that Plaintiff passed this
2 stage of the hiring procedure and that the Human Resource Specialist, Jay Bonner,
3 scheduled Plaintiff for an interview with the Review Board. *Id.* ¶ 5.

4 The members of the Review Board interviewed the applicants who made it to this
5 stage of the process, and assigned numerical scores to each applicant's responses. *See id.*
6 ¶ 6; Dkt. 36, Affidavit of Ronald Nilsby ("Nilsby Aff."), ¶ 4; Dkt. 37, Affidavit of Bobby
7 Huffman ("Huffman Aff.") ¶ 3. It is undisputed that the Review Board interviewed
8 Plaintiff. Defendants claim that the interviewers did not know whether Plaintiff had a
9 disability or had engaged in prior EEO activity. *See Bonner Aff.* ¶ 4; *Nilsby Aff.* ¶ 3;
10 *Huffman Aff.*, ¶ 2.

11 Defendants claim that the Executive Board determined the cutoff score for
12 participation in the ASP and that the Executive Board determined the number of
13 applicants who would qualify based upon the number of current EAS-17 supervisor
14 vacancies and anticipated vacancies. *Bonner Aff.*, ¶ 7; Dkt. 38, Affidavit of Katherine
15 Nash ("Nash Aff."), ¶¶ 1-3; Dkt. 39, Affidavit of Robert Montgomery, ¶¶ 1-2; Dkt. 40,
16 Affidavit of Jon Patten, ¶¶ 1-4. Defendants claim that, based on the number of vacancies,
17 the Executive Board determined that the cutoff score of 81 was the lowest acceptable
18 score and, therefore, only those applicants with a score of 81 or higher were eligible for
19 the ASP program. *Bonner Aff.*, ¶ 7. Defendants also claim that, because more than one
20 applicant scored 81, all applicants with that score or a higher score were accepted, even
21 though that meant that more than 40 applicants participated in the ASP. *Id.*

22 Plaintiff claims that on March 12, 2008, Plaintiff's Group Leader Bob Fitzgerald
23 told Plaintiff that Plaintiff had made it into the ASP. Dkt. 13 at 2. Plaintiff claims that he
24 then called Mr. Bonner and asked about being accepted for the ASP. *Id.* Plaintiff claims
25 that Mr. Bonner said that Plaintiff had not been accepted. *Id.* Plaintiff alleges that the
26 score used to disqualify him was not his score. *Id.* at 3.

1 With respect to Plaintiff's claims of discrimination and retaliation, Defendants
2 claim that the members of the Executive Board did not know that Plaintiff allegedly was
3 disabled or had engaged in prior EEO activity. *See, e.g.*, Nash Aff., ¶ 3.

4 Defendants claim that Plaintiff was not accepted into the ASP because his
5 interview score was 79, which fell below the cut-off score of 81. Bonner Aff., ¶; Dkt. 34,
6 Exh. A (March 13, 2008 letter to Plaintiff).

7 **III. DISCUSSION**

8 As a threshold matter, the parties dispute Plaintiff's claims and the proper
9 Defendants for those claims. Although Plaintiff claims a violation of the Americans with
10 Disabilities Act of 1990 ("ADA"), the exclusive remedy for a federal employee claiming
11 discrimination based on disability is under the Rehabilitation Act of 1973. *See* 29 U.S.C.
12 §§ 791 et seq.; *Johnston v. Horne*, 875 F.2d 1415, 1418-19 (9th Cir. 1989), *overruled on*
13 *other grounds*, *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89 (1990). Therefore, the
14 Court dismisses Plaintiff's ADA claim.

15 Defendants argue that the Court should dismiss all claims against all Defendants
16 except Defendant Potter because the Court is without subject matter jurisdiction. The
17 Court agrees because Plaintiff's Title VII and Rehabilitation Act claims may only be
18 brought against his employer the Postmaster General. *See Romain v. Shear*, 799 F.2d
19 1416, 1418 (9th Cir. 1986) (ADEA); *Johnston*, 875 F.2d at 1418-19 (9th Cir.1989)
20 (Rehabilitation Act). Therefore, the Court dismisses Plaintiff's claims against Eric
21 Holder Jr., in his official capacity as United States Attorney General; Jeffery C. Sullivan,
22 in his official capacity as United States District Attorney; and Jay Bonner, Ronald Nilsby,
23 Paula Louise Stafford, Bob Huffman, Katherine Nash, Jon Patton, and Robert
24 Montgomery in their official capacities with the United States Postal Service.

25 The Court now turns to the parties' cross-motions for summary judgment on
26 Plaintiff's claims against Defendant Potter.
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1 **A. Summary Judgment Standard**

2 Summary judgment is proper only if the pleadings, the discovery and disclosure
3 materials on file, and any affidavits show that there is no genuine issue as to any material
4 fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).
5 The moving party is entitled to judgment as a matter of law when the nonmoving party
6 fails to make a sufficient showing on an essential element of a claim in the case on which
7 the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323
8 (1985). There is no genuine issue of fact for trial where the record, taken as a whole,
9 could not lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec.*
10 *Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (nonmoving party must
11 present specific, significant probative evidence, not simply “some metaphysical doubt”).
12 *See also* Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a material fact exists if
13 there is sufficient evidence supporting the claimed factual dispute, requiring a judge or
14 jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477
15 U.S. 242, 253 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d
16 626, 630 (9th Cir. 1987).

17 The determination of the existence of a material fact is often a close question. The
18 Court must consider the substantive evidentiary burden that the nonmoving party must
19 meet at trial – e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477
20 U.S. at 254; *T.W. Elec. Serv., Inc.*, 809 F.2d at 630. The Court must resolve any factual
21 issues of controversy in favor of the nonmoving party only when the facts specifically
22 attested by that party contradict facts specifically attested by the moving party. The
23 nonmoving party may not merely state that it will discredit the moving party’s evidence at
24 trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elec.*
25 *Serv., Inc.*, 809 F.2d at 630 (relying on *Anderson, supra*). Conclusory, nonspecific
26 statements in affidavits are not sufficient, and missing facts will not be presumed. *Lujan*
27 *v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 888-89 (1990).

1 In addition, “[i]t is not our task, or that of the district court, to scour the record in
2 search of a genuine issue of triable fact. We rely on the nonmoving party to identify with
3 reasonable particularity the evidence that precludes summary judgment.” *Keenan v.*
4 *Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996).

5 **B. Rehabilitation Act**

6 To state a prima facie case for disability discrimination under the Rehabilitation
7 Act, a plaintiff must demonstrate that (1) he is a person with a disability, (2) who is
8 otherwise qualified for employment, and (3) suffered discrimination because of his
9 disability. *Walton v. U.S. Marshals Service*, 492 F.3d 998, 1005 (9th Cir. 2007).

10 To state a prima facie case for failure to accommodate under the Rehabilitation
11 Act, a plaintiff must show that (1) he is a qualified individual with a disability, (2)
12 accommodation is required to enable him to perform essential job functions, and (3)
13 reasonable accommodation is possible. *Buckingham v. U.S.*, 998 F.2d 735, 739-40 (9th
14 Cir. 1993).

15 In this case, Defendant argues that Plaintiff has failed to show that he has a
16 disability, that he was discriminated against, or that he did not receive reasonable
17 accommodation. Dkt. 34 at 8-12. The Court will address each of these contentions.

18 **1. Disability**

19 The Rehabilitation Act defines an “individual with a disability” as one who (1) has
20 a physical or mental impairment that substantially limits one or more major life activities;
21 (2) has a record of such an impairment; or (3) is regarded as having such an impairment
22 by the person’s employer. 29 U.S.C. § 705(20)(B). The Ninth Circuit looks to the
23 standards applied under the ADA to determine whether a violation of the Rehabilitation
24 Act occurs in the employment context. 29 U.S.C. § 794(d); *Coons v. Secretary of the*
25 *U.S. Dept. of Treasury*, 383 F.3d 879, 884 (9th Cir. 2004).

26 In this case, Plaintiff alleges that he “suffers from a disability that is life
27 threatening and limits [his] activities. Breathing.” Complaint at 10 (emphasis in original).
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1 Defendant claims that, during the administrative investigation of Plaintiff's claims,
2 Plaintiff alleged that he suffered from sleep apnea. Dkt. 34 at 11. For either alleged
3 disability, Plaintiff has failed to establish that (1) he had a record of such an impairment
4 or (2) that his employer regarded him as having such an impairment. This is not a finding
5 that Plaintiff does not suffer from these disabilities or that, if he does suffer from these
6 disabilities, he is not substantially limited in a major life activity. This is merely a finding
7 that Plaintiff has failed to meet his burden of proof as to each element under the
8 Rehabilitation Act.

9 Plaintiff also asserts that the record shows that he has "FMLA and disability as a
10 Retired Disabled Veteran." Dkt. 44 at 1. This, however, is a bare assertion without
11 factual support and does not satisfy any of the three requirements under 29 U.S.C. §
12 705(20)(B).

13 Therefore, the Court grants Defendant's motion for summary judgment on
14 Plaintiff's claim under the Rehabilitation Act because he has failed to establish that he is
15 an individual with a disability.

16 **2. Discrimination**

17 Defendant argues that even "if there is a genuine issue of material fact as to
18 whether Mr. Cornette was disabled as of the time of the ASP application process, his
19 claim for disability discrimination must fail." Dkt. 34 at 11. The Court agrees because
20 Plaintiff has failed to submit any facts that would tend to prove that he was discriminated
21 against *because of* his disability. Instead, Plaintiff merely alleges that he has a disability
22 and that he was discriminated against in the application procedure for the ASP and
23 therefore he suffered discrimination because of his disability. Defendant has submitted
24 admissible evidence that the Executive Review Board, the decision maker for the
25 application process, was unaware of Plaintiff's alleged disabilities. Plaintiff has failed to
26 submit evidence contradicting these facts. Therefore, the Court grants Defendant's
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1 motion for summary judgment on Plaintiff's claim for disability discrimination under the
2 Rehabilitation Act.

3 **3. Accommodation**

4 Defendant argues that Plaintiff "has failed to establish his failure to accommodate
5 claim, even if the Court were to find a genuine issue of material fact as to whether he was
6 disabled at the time of the application process." Dkt. 34 at 11. Under the Rehabilitation
7 Act, "reasonable accommodation" means "[m]odifications or adjustments to a job
8 application process that enable a qualified applicant with a disability to be considered for
9 the position such qualified applicant desires." 29 C.F.R. § 1630.2(o)(1)(i). To trigger
10 liability for failure to accommodate, a plaintiff has an initial duty to inform the employer
11 of the disability and to request an accommodation. *See, e.g., Barnett v. U.S. Air, Inc.*, 228
12 F.3d 1105, 1114 (9th Cir. 2000), *vacated and remanded on other grounds*, 122 S. Ct.
13 1516 (2002).

14 In this case, Plaintiff has failed to submit any evidence that he notified his
15 employer of his alleged disabilities or that he requested any specific accommodation.
16 Therefore, the Court grants Defendant's motion for summary judgment on Plaintiff's
17 claim for failure to accommodate under the Rehabilitation Act because Plaintiff has failed
18 to meet his burden.

19 **C. Retaliation**

20 Defendant claims that Plaintiff has not specified the federal statute under which he
21 brings his retaliation claim. Dkt. 34 at 12-13. The analysis, however, is the same under
22 either Title VII or the Rehabilitation Act. *See Brooks v. City of San Mateo*, 229 F.3d 917,
23 928 (9th Cir. 2000) (Title VII); *Coons*, 383 F.3d at 887-888 (Rehabilitation Act). To
24 establish a retaliation claim, a plaintiff must show (1) involvement in a protected activity,
25 (2) an adverse employment action and (3) a causal link between the two. *Brooks*, 229
26 F.3d at 928.

1 In this case, Plaintiff has failed to show a prima facie case of retaliation because he
2 has failed to show any link between his alleged protected activity and the alleged adverse
3 employment action. In fact, he has no evidence that any member of the Executive Board
4 knew he had engaged in prior EEO activity. Even if the Court did consider as evidence
5 Plaintiff's allegation that the board members had "access" to discover his prior EEO
6 activity, Defendant has put forth a legitimate, non-retaliatory basis for the adverse
7 employment action by submitting evidence that Plaintiff did not receive a high enough
8 score to be considered for the program. In light of this non-retaliatory basis, Plaintiff has
9 failed to show that this basis is merely pre-text for unlawful retaliation. Therefore, the
10 Court grants Defendant's motion for summary judgment on Plaintiff's retaliation claim
11 because Plaintiff has failed to meet his burden.

12 **D. Plaintiff's Motions**


13 The Court denies Plaintiff's motion for summary judgment because the Court
14 grants Defendant's motion for summary judgment on all of Plaintiff's claims. The Court
15 also denies Plaintiff's motion for reconsideration because Plaintiff's arguments are
16 without merit.

17 **IV. ORDER**

18 Therefore, it is hereby

19 **ORDERED** that Plaintiff's motion for summary judgment (Dkt. 13) is **DENIED**,
20 Defendants' cross motion for summary judgment (Dkt. 34) is **GRANTED**, and Plaintiff's
21 motion for reconsideration (Dkt. 47) is **DENIED**.

22 DATED this 21st day of December, 2009.

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24 
25 BENJAMIN H. SETTLE
26 United States District Judge
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